specific acts of unchastity on the part of the plaintiff, and the court declared that he did not thereby open the field to the plaintiff to offer evidence to support her reputation.

Courts of other jurisdictions take an opposite view which although it seems to represent the weight of authority, numerically speaking, is not *ipso facto* the better rule. It has been held by an Indiana court that "the appellant's testimony (showing specific acts of unchastity) put her character in issue, and it would be a harsh rule that would not allow her to vindicate her character." [8] And, to use the words of an Illinois court, "Then (when specific acts of immorality are pleaded) the attack upon the character of the plaintiff is as direct as in the case of an indictment for a crime. And no reason is perceived why, when such attack is made, although it comes from a defendant instead of a plaintiff, the latter should not be permitted to prove general good character, for the purpose of rendering it improbable that the charge is well founded." [9] To the same effect are decisions in other jurisdictions.[10]

It is submitted that the fallacy in this line of reasoning lies in the statement that the plaintiff's character is attacked by such a defense. This statement is manifestly incorrect. Her character is not attacked in any legal sense, and consequently is not in issue. It is clear that the reputed character or reputation of a person is not attacked in any legal sense by the affirmative proof of specific acts of immorality. Specific acts of misconduct do not evidence bad reputation, and *a fortiori* good reputation does not tend to prove the non-commission of improper acts. Admitting this reasonable view, the principal case seems to be strictly correct in theory, and the cases *contra* seem to have turned on the courts' ostensible determination to allow a person's good reputation to be upheld at all hazards and without regard to fundamental rules of evidence.

M. G.

PROPERTY—RIGHT AS BETWEEN LIFE TENANT AND REMAINDERMAN IN DISTRIBUTION MADE BY A CORPORATION.—The question raised in Newport Trust Co. v. Van Rensselaer,[1] whether a distribution made by a corporation during the continuance of a life estate is to be treated as income or capital, and, accordingly, belongs to life tenant or remainderman, is primarily a question of the intention manifested by the will or other instrument by which the right to the income is, for the time being, severed from the corpus.

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[8] Jones v. Layman, 123 Ind. 569 (1889).

[9] Sprague v. Craig, 51 Ill. 288 (1869).

[10] Smith v. Hall, 69 Conn. 651 (1897); Harriman v. Layman, 118 Ia. 590 (1902).

[1] 78 Atl. Rep. 1009 (R. I. 1911).

This is expressly or impliedly recognized by all the cases on the subject.[2]

In most cases the instrument merely directs the payment of "earnings," or "income," or occasionally "dividends" to the life tenant; and such terms are not sufficiently explicit to furnish a rule for the guidance of a court when the distribution by the corporation is of an unusual or extraordinary nature. And it is mainly on the disposition of such dividends that the courts differ. The general rule applying to ordinary distributions is that a regular cash dividend belongs to the person holding the stock at the time the dividend is declared.[3] The case of a life tenant dying between the declaration and the payment of a dividend, seems not to have arisen in America; but in Wright v. Tuckett,[4] Vice-Chancellor Wood adhered to the general rule, and directed the dividend to be paid to the representative of the tenant for life. Since a dividend is not due when declared, and since stockholders have no legal title to the profits of the business until a division is made,[5] it is submitted that a better rule would be to give the dividend to the person having the beneficial interest in the stock at the time the dividend is payable.

It is also to be observed that the conflict of opinion previously mentioned is confined to distributions which are made from earnings past and current. The courts substantially agree that a dividend, so called, whether in the form of cash or stock, which represents a reduction or enhancement of the value of assets representing capital, from sources other than the accumulation of earnings, belongs to the corpus and not to the income.[6]

In the principal case the court was confronted with the disposition of an extraordinary dividend. The D., L. & W. R. R. Co. organized a coal company, and declared a dividend of 50 per cent. to stockholders of the railroad company, payable in cash or part to be paid to the coal company for stock therein. The organization of

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[2] Gibbons v. Mahon, 136 U. S. 549 (1890); Spooner v. Phillips, 62 Conn. 62 (1892); Thomas v. Gregg, 78 Md. 545 (1894).

[3] Bates v. Mackinley, 31 Beav. 280 (Eng. 1862); Matter of Kernochan, 104 N. Y. 618 (1887); 2 Thompson on Corp., §2201; Taylor on Priv. Corp., §799.

[4] 1 John. & Hem. 266 (Eng. 1860).

[5] Robertson v. de Brulatour, 188 N. Y. 301 (1907); Waterman v. Alden, 42 Ill. App. 294 (1891).

[6] Kalbach v. Clark, 133 Iowa 215 (1907); Hite v. Hite, 93 Ky. 257 (1892); Gilkey v. Paine, 80 Me. 319 (1888); Walker v. Walker, 68 N. H. 407 (1895); and see Pritchitt v. Nashville Trust Co., 96 Tenn. 472 (1896) for a full discussion of the subject of this note. For a novel analysis of a stock dividend, and its division according to its sources, see Carter v. Crehore, 12 Haw. 309 (1900).

An apparent exception to this general rule is found in cases where the business is such that the capital, in the ordinary course of the company's activities, is being consumed or undergoing changes of form, *e. g.*, a land company. Reed v. Head, 88 Mass. 174 (1863); Thomson's Est., 153 Pa. 332 (1893).

the coal-selling company was the railroad's method of complying with the decision of the United States Supreme Court [7] that it could not carry its own coal; and the coal company accordingly contracted to buy all the coal mined by the railroad company at the mines. Though not a tangible asset, the company gave up a valuable right—to sell its coal at the market. The coal company capitalized the profit to be made out of this re-sale; so it is apparent that the railroad gave up a means of income. But the road received nothing for this right or asset; so that it had no new fund out of which to declare the dividend. The distribution was, therefore, an unusual cash dividend from earnings past and current.

There are four well defined lines of decision on the disposition of such a dividend. The early English rule, now practically obsolete and of little more than historical interest, gave all extraordinary or unusual dividends, whether of stock or cash, to the remainderman.[8] The later English rule, commonly called the Massachusetts rule, regards cash dividends, however large, as income, and stock dividends, however made, as capital.[9] This rule is not as simple of application as it appears, because the inquiry must first be made "whether such distribution is an apportionment of additional stock representing capital or a division of profits and income." [10] This rule does not inquire whether the dividend was earned before the death of the testator or during the life tenancy; and disposition is made irrespective of the period covered by the accumulation of the fund from which it is declared. Likewise in New York and Kentucky the courts flatly reject the principle of apportionment between capital and income, and give any dividend, whether stock or cash, to the life tenant.[11] The Pennsylvania rule, often called the American rule, like the New York rule, refuses to let the character of the dividend control its distribution; but unlike both Massachusetts and New York rules, inquires when the fund out of which the dividend is paid, was accumulated. In the leading case in which the court applied this equitable rule,[12] it had to distribute a stock dividend; but the same principle of apportionment has been applied in cases of cash dividends.[13]

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[7] U. S. v. D., L. & W. R. R. Co., 213 U. S. 366 (1908).

[8] Brauder v. Brauder, 4 Ves. Jr. 800 (Eng. 1799); Irving v. Houston, 4 Paton Sc. App. (Eng. 1893). But see qualification of this case in Bouch v. Sproule, L. R. 12 App. Cas. 385 (1887).

[9] Sproule v. Bouch, L. R. 29 Ch. D. 635 (1885), opinion of Fry, J., quoted with approval by Lord Herschell in Bouch v. Sproule, *supra; In re* Alsbury, L. R. 45 Ch. D. 237 (1890); Green v. Bissell, 79 Conn. 547 (1907); Waterman v. Alden, *supra;* Minot v. Paine, 99 Mass. 101 (1868).

[10] Mr. Justice Gray, in Gibbons v. Mahon, 136 U. S. 549 (1890), which approves the Massachusetts rule.

[11] Hite v. Hite, *supra;* Robertson v. de Brulatour, *supra.* And see Chester v. Buffalo Co., 70 App. Div. 443 (N. Y. 1902).

[12] Earp's Appeal, 28 Pa. 368 (1857).

[13] Van Doren v. Alden, 19 N. J. Eq. 176 (1868); Holbrook v. Holbrook, 74 N. H. 201 (1907); Oliver's Est., 136 Pa. 43 (1890).

The trustee in the principal case took half the dividend in stock in the coal company, and the other half in cash. But the case differs from the usual case of a stock dividend, for here the stock in effect given to stockholders, was stock in another company. There was no controversy over the stock, so that the interesting question of the right to subscribe to new stock was not raised. The court had to dispose of the cash only; and its decision, together with Petition of Brown,[14] brings Rhode Island in line with the Massachusetts rule.

C. L. M.

SALES—DELIVERY OF GOODS DIFFERING FROM THE DESCRIPTION GIVEN.—The question of the liability of a seller of seeds upon warranties of their identity has been productive of much discussion and litigation. A case on this subject, presenting a rather interesting problem, was recently decided in the House of Lords.[1] A quantity of seed, described as "common English sainfoin," was sold, the following provision being one of the conditions of the sale: "Sellers give no warranty, express or implied, as to growth, description, or any other matters." The seed was re-sold by the buyer, and was later discovered to be "giant sainfoin" and not "common English sainfoin." Of this fact the buyer was ignorant at the time of the sale, as the appearance of the two varieties of seed is substantially identical. The buyer, therefore, sued the seller for damages. In the Court of Appeal[2] he was unsuccessful; but the House of Lords allowed recovery.

Both courts agreed that in a sale by description, it is an implied condition of the sale that the goods furnished be of the same description as those contracted for. Further, upon a breach of this condition, the buyer may do either one of two things: reject the goods, or accept them and sue for damages. Up to this point there is no doubt as to his rights.

This difficulty is, however, now encountered. The courts, in defining the buyer's right to sue for damages upon acceptance of the goods, have invariably said that he can no longer treat the conditions as such, but only as an agreement, a representation, or a warranty. The rule is usually stated somewhat as follows: "If, indeed, he" (the buyer) "has received the whole, or any substantial part, of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak more properly, perhaps, ceases to be available as a condition, and becomes a warranty in the narrow sense of the word, namely, a stipulation by way of

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[14] 14 R. I. 371 (1884).

[1] Wallis v. Pratt, App. Cas. 1911, 394.

[2] 79 L. J. K. B. 1013.